

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GREGORY NICHOLAS STESHENKO,
Plaintiff,

v.

THOMAS MCKAY, et al.,
Defendants.

Case No. [09-cv-05543-RS](#)

**ORDER RE CERTAIN PENDING
MOTIONS**

This order addresses several pending motions that have previously been, or hereby are, submitted without oral argument, pursuant to Civil Local Rule 7-1(b).

1. Leave to amend (Dkt. No. 710)

Plaintiff seeks leave to file a Sixth Amended Complaint. His motion includes a request for reconsideration, as a prerequisite to the portion of the proposed amendments that would otherwise be foreclosed by prior rulings. The parties characterize the proposed amendments as permitting plaintiff to:

- (1) Include the defendants Dorothy Nun and Anne Lucero in their official capacities for claims seeking injunctive relief;
- (2) Add certain college officials in their official capacities for purposes of plaintiff's claims under 42 U.S.C. § 1983 and 1985;
- (3) Re-assert Plaintiff's claim for monetary damages against Cabrillo Community College

1 District under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 200d et seq., Title IX
2 of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., and the Age
3 Discrimination Act of 1975, 42 U.S.C. § 6101 et seq., and;

4 (4) Expressly state the federal statutes on which plaintiff's discrimination claims are based.

5 At this stage in this long-running litigation, the liberal policy permitting amendment must
6 be balanced against the potential prejudice to defendants. The request to add claims against Nun
7 and Lucero in their official capacities, and to add wholly-new individual defendants in their
8 official capacities, is denied. Plaintiff's concern is that there be an appropriate defendant or
9 defendants against whom prospective injunctive relief can be entered. Even if it may sometimes
10 be proper to name individual defendants in their official capacities for that purpose, in this
11 instance the College is a party directly, and it acknowledges that individual capacity claims would
12 be redundant. Under the circumstances here, in the event plaintiff were to prevail on any claim for
13 prospective injunctive relief, there is no doubt that the Court has jurisdiction to enter an
14 enforceable order against the College itself. Accordingly, while plaintiff will not be permitted to
15 add the individual capacity claims at this late juncture, he need not be concerned that the absence
16 of those claims will prejudice him.

17 Plaintiff's request to amend the complaint to identify additional statutory bases of his
18 discrimination claims is granted. His request for reconsideration and for leave to reassert damages
19 claims against the College based on the specified statutes is granted. (To the extent plaintiff might
20 prove liability only under statutes or claims not providing for Eleventh Amendment waiver,
21 however, monetary damages against the College would remain unavailable.)

22 The Sixth Amended Complaint, as limited by this order, is hereby deemed filed as of this
23 date. While defendants may file a response if they so elect, they are hereby relieved from the
24 obligation to do so, and their existing answer shall be deemed to apply, with any new factual
25 averments of the Sixth Amended Complaint deemed to have been denied.

1 2. Motion to compel (Dkt. No. 740)

2 Plaintiff seeks an order compelling defendants to “authenticate” documents they have
3 produced in discovery. A party has no such obligation. Indeed, a party must produce any
4 document in its possession, custody, or control that is responsive to a proper document request
5 without regard to whether the party has means to “authenticate” the document, and even if there
6 were reason to doubt the “authenticity” of the document. The parties should, of course, meet and
7 confer as part of the pre-trial preparation process to reach stipulations as to the authenticity of any
8 documents where feasible. Plaintiff’s further request that defendants be compelled to provide
9 certain verifications of their discovery responses is moot, as the verifications have now been
10 provided. Accordingly, this motion is denied.

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12 3. Motion to clarify sanctions ruling (Dkt. No. 749)

13 Plaintiff seeks further guidance as to the nature and scope of sanctions to be imposed
14 against defendants for evidence spoliation. As reflected in the order denying the College
15 Defendants’ motion for summary judgment, presumptions have already been applied against them
16 in that context. No further pre-trial determinations are appropriate as to the extent to which
17 spoliation may have occurred or as to what, if any, sanctions should result, but must await
18 testimony at trial.

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20 4. Motion to preclude McKay testimony (Dkt. No. 750)

21 Plaintiff seeks to preclude defendant McKay from testifying, based on a contention that he
22 has offered false testimony and responses during discovery, and in light of the spoliation issues.
23 A witness’ veracity, or lack thereof, is for the trier of fact to evaluate. Purported inconsistencies in
24 discovery responses may provide a basis for cross-examination, but are not grounds to exclude a
25 party from testifying. The motion is denied.

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27 5. Motion to compel identification of document “sources” (Dkt. No. 765)
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1 Contending that defendants have produced some documents that appear to be “crudely
2 made forgeries,” plaintiff seeks to compel defendants to identify the “sources” from which
3 documents were collected, or, in the alternative, to preclude them from testifying about their
4 document preservation efforts and arguing that they did not engage in spoliation. The motion is
5 denied. Plaintiff has pointed to no timely discovery request regarding the “sources” of the
6 documents that defendants failed to answer, and there is no other basis for compelling the types of
7 information plaintiff is demanding at this juncture.

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9 6. Motion to compel production of the “Johnson Study” (Dkt. No. 783)

10 Plaintiff seeks a copy of a study conducted by Barbara Johnson, discussed at the Rule
11 30(b)(6) deposition of Dorothy Nunn on July 21, 2014. Whatever technical merit defendants’
12 opposition may have regarding the adequacy of plaintiff’s meet and confer efforts, the absence of
13 a formal request, the timeliness of this motion, and whether it should have been presented to the
14 magistrate judge, the record reflects that at the deposition counsel appropriately committed to
15 make good faith efforts to produce the document. Even if there was a subsequent failure on
16 plaintiff’s side to follow up, defendants should now honor that commitment. Defendants shall
17 produce the study within one week of the date of this order.

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19 7. Motion to “clarify” order re experts (Dkt. No. 786)

20 Plaintiff’s prior motion to appoint experts was denied. Apparently because plaintiff may
21 be considering presenting the experts at his own expense, he now complains that the order did not
22 address his additional request for time limitations to be imposed on *voir dire*, examination and
23 cross-examination of those experts to minimize costs. Plaintiff requests that such limits now be
24 imposed. The motion is denied. At the pretrial conference, the parties will be given strict time
25 limitations that will apply to the presentation of all of the evidence. While no specific limitations
26 will be imposed as to how parties use their time, plaintiff may be assured that in the event he
27 presents expert testimony, defendants will not be permitted to engage in unreasonably lengthy *voir*
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1 *dire* or cross-examination merely to drive up his costs. That said, neither will defendants be
2 precluded from spending such time in *voir dire* and cross-examination as is reasonably necessary
3 in light of the expert testimony proffered.

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5 8. Motion seeking court funds (Dkt. No. 787)

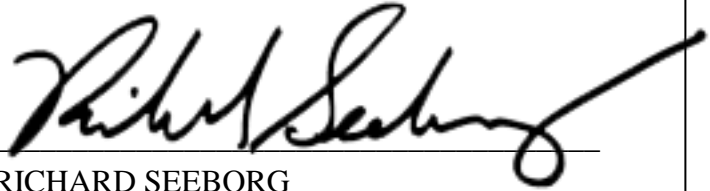
6 Plaintiff's request to be provided funds from the Court to pay his expert witnesses for trial
7 testimony is denied.

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9 9. Motion for leave to seek reconsideration (Dkt. No. 811)

10 Plaintiff's motion for leave to seek reconsideration of the order granting summary
11 judgment in favor of the Hospital Defendants is denied. The purported "new facts" on which
12 plaintiff relies do not support reconsideration.

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14 **IT IS SO ORDERED.**

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16 Dated: November 14, 2014

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19 RICHARD SEEBORG
20 United States District Judge
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